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No. 94-749

In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, *et al.*,

Petitioners,

vs.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

MOTION AND BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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MOTION OF THE INDIVIDUAL RIGHTS FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rule 37.4, the Individual Rights Foundation (IRF) respectfully moves for leave to file the attached brief amicus curiae in support of the petitioners' position that the judgment entered below should be reversed. Petitioners have granted consent; respondents have denied it.

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First Amendment's free

speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes the bimonthly *Defender,* which has a circulation of about 50,000, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public discourse because in its view such attempts pose a serious threat to our Republican form of government.

Since the 1994 Boston St. Patrick's Day Parade did not involve state action, the IRF believes that the lower courts erred in applying the state public accommodation anti-discrimination statute to compel the sponsors of the parade to include the plaintiffs' message.

The attached brief is therefore submitted in support of the petitioners and urges the court to vacate and remand the decision below.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION

INTEREST OF AMICUS

The interest of the Individual Rights Foundation (IRF), as amicus curiae, is set forth in the accompanying motion.

STATEMENT OF THE CASE

In this case the petitioners challenge the constitutionality of an injunction issued by the Massachusetts superior court

requiring the South Boston Allied War Veterans Council ("the Council"), as sponsors of the 1994 Boston St. Patrick's Day Parade, to permit an identifiable contingent of gay and lesbian marchers to participate in the Parade.[1] This amicus party adopts the Statement of the Case set forth in the appeal brief filed for the Council. Nonetheless, the IRF wishes to highlight a few points in the lower court's decisions:

1. *The Superior Court Decision.* The trial judge's opinion contained an extensive discussion of whether the City's involvement in the Parade amounted to state action and concluded that the Council did not act on behalf of the City but merely as a private party. (B. 10-22). The trial judge rejected the petitioners' contention that the Parade was an exercise of their constitutionally protected right of expressive association because participation in the Parade:

> . . . is not limited on the basis of similarity of viewpoints . . . [S]ome of the messages expressed in the Parade contradict those espoused by other participants . . . The only common theme among the participants and sponsors is their public involvement in the Parade. Indeed, the Veterans' position is paradoxical: a *proper* celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness; *an assertion of a*

1. The petitioners present two questions for review: (1) Whether the state court violated the petitioners' First Amendment rights " . . . when it compelled the petitioners to include, in their privately organized Parade, a message the petitioners deemed unwarranted and antithetical?" and (2) "Whether petitioners' refusal to include a gay, lesbian and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the petitioners' First and Fourteenth Amendment rights as guaranteed by the United States Constitution?" Pet. Cert. at i.

> *right of expressive association requires focus on a specific message, theme, or group* — perhaps a Temple or Parish congregation.

(B. 24) (emphasis added).

In conclusion the trial judge stated that:

> History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade.

(B. 28).

2. *The Supreme Judicial Court (SJC) Decision.* The SJC (C. 6) sustained the trial judge's finding that inconsistent and changing explanations for excluding GLIB justified a conclusion that GLIB was excluded from the Parade because of the sexual orientation of its members. (B. 4). This was error. Disbelief of testimony never constitutes affirmative evidence for the contrary proposition for the party having the burden of proof. As the dissenting SJC justice pointed out (C. 25 n.4), there was no evidence that the Council inquired into the sexual orientation of anyone who wished to participate in the Parade. After describing the history of the Parade, the SJC found that it was a place of public accommodation and that the Massachusetts Anti-Discrimination Statute would be given a "broad interpretation". (C. 11-12).

The SJC then turned to the petitioners' First Amendment constitutional arguments and stated that:

> In order to rely on the protections of the First

> Amendment for speech or expressive association, the defendants initially had to demonstrate that the parade *truly* was an exercise of those First Amendment rights. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). This, the judge found, they did not do.

(C. 14) (emphasis added).

In a footnote, the SJC subsequently stated that it would leave open "for an appropriate case the question whether the public accommodation law permissibly could be applied to a *genuine* exercise of First Amendment rights." (C. 16 n.21) (emphasis added).

Justice Nolan dissented, stating that the trial judge violated the First Amendment in ordering that if a private group "wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree." (C. 17).

ARGUMENT

I. PRELIMINARY OBSERVATIONS ABOUT FIRST AMENDMENT PROTECTIONS.

This Court is bound by the construction given by the Massachusetts SJC to the Massachusetts Anti-Discrimination Statute. *R.A.V. v. City of St. Paul Minnesota*, 504 U.S. ___, 112 S. Ct. 2538, 2542 (1992). The issue before this Court is whether the SJC's construction of the statute squares with the First Amendment.

It is important at the outset to focus on what is not at issue.

This Court does not have before it any constitutional question as to whether the State of Massachusetts may prohibit discrimination in participation in the Parade on the basis of sexual orientation.

Your amicus respectfully submits that the Massachusetts courts made two errors: First, the lower courts erred in ruling that petitioners' freedom to associate (or, more accurately, freedom not to associate) under the First Amendment did not apply because so many had participated in the Parade in the past. Second, merely because diverse interests were represented in the Parade did not mean that it had no expressive message under the First Amendment or that the Council should be forced to convey a message with which it disagreed.

II. ASSOCIATIONAL RIGHTS UNDER THE FIRST AMENDMENT ARE NOT LIMITED TO NARROW HOMOGENOUS GROUPS WHICH HAVE RIGID RULES FOR SELECTION.

The trial judge found significant that there was "a lack of genuine selectivity" (B. 6) and noted that "some of the messages expressed in the Parade contradict those espoused by other participants." (B. 24). There are many large private groups which similarly lack "genuine selectivity" and contain members whose "messages" contradict each other. For example, the Democratic Party only two generations ago had some members who wanted to enact extensive civil rights legislation (such as, for example, Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell, etc.). The Democratic Party also did not have (and has not had) a consistent way of selecting its members. Merely because the Democratic Party contained members who believed in segregation as well as those who wanted extensive civil rights laws enacted does not mean that the

First Amendment right of free association does not apply. The same observation can be made for other groups, including the Boy Scouts, the Roman Catholic Church and the three principal branches of the Jewish faith (Conservative, Reform, and Orthodox).

The record in this case demonstrated that tens of thousands of people participated in the Parade, and hundreds of thousands of people viewed it. It follows necessarily that the Parade participants would include people who did not have the same messages or whose messages would contradict each other.

Freedom of association is not limited under the First Amendment to small homogenous groups who have consistent, written procedures, criteria, or standards for selecting participants. This Court has stated that "freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984), citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35, 97 S. Ct. 1782, 1799, 52 L. Ed. 2d 261 (1977). *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (First Amendment prohibits the state from requiring a club to include those "individuals who do not share the views that the club's members wish to promote,").

III. THE FIRST AMENDMENT FREE SPEECH PROTECTION IS NOT LIMITED TO CONSISTENT, DISTINCT, HOMOGENOUS, OR ARTICULATE MESSAGES.

The second error made by the courts below was pointed out by the dissenting justice, in which he observed that the:

> . . . Council does not need a narrow or distinct theme or message in its parade for it

> to be protected under the First Amendment. Both the judge and the majority tried to illustrate that the parade is a public celebration with no distinct, unified theme; the implication is that it is not expressive activity, and is therefore not worthy of First Amendment Protection.

(C. 21).

As the dissenting justice further points out, " . . . regardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not on the parade, it cannot constitutionally be forced on the veterans' council." (C. 21).

The tone of the SJC opinion suggests that the First Amendment distinguishes between articulate, coherent, specific messages but provides no protection unless the First Amendment claim is "genuine." (C. n.21). The SJC cites this Court's opinion in *R.A.V. v. City of St. Paul, Minnesota,* 504 U.S. ___, 112 S. Ct. 2538, 2542-48 (1992). Your amicus respectfully submits that the opinion of the court in *R.A.V.*, while canvassing the cases under the First Amendment, provides no support for the proposition that some First Amendment claims are "genuine" and others are not. What is clear from this Court's precedents is that if the content of a communication is implicated, the State must demonstrate compelling interest to sustain the statute under the First Amendment. *R.A.V., supra,* 112 S. Ct. at 2550.

The SJC also stated that to be protected by the First Amendment " . . . the defendants initially had to demonstrate that the parade truly was an exercise of those First Amendment rights. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984)." (C. 14). The SJC then states that the trial

judge's finding that the petitioners did not meet this burden was not clearly erroneous under Mass. R. Civ. P. 52(a). Concededly, footnote 5 in the *Clark* decision does state that it is the obligation "of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Id. Clark* involved demonstrators who wished to sleep overnight in Lafayette Park. The instant case, by contrast, involves a parade through the streets of Boston. Such conduct has been recognized by this Court to constitute expressive conduct. *See Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S. Ct. 954, 964 (1939) (". . . streets and parks . . . have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

The trial court characterized the Parade as representing diverse "interests and viewpoints," including "religious," "eleemosynary," "patriotic" and "moral" viewpoints. (C. 7). The Council characterized its views as "traditional religious and social values". (C. 5). This Court has expressly stated that:

> [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. 468 U.S. 609, 622, 104 S. Ct. 3244, 3252 (1984).

In *Roberts* this Court upheld a Minnesota statute which was construed to prohibit the United States Jaycees from discriminating against women. The Court expressly recognized that the Minnesota statute "plainly implicated" the right of free association under the First Amendment. *Id.* Only "compelling state interests, unrelated to the suppression of ideas, that cannot

be achieved through means significantly less restrictive of associational freedoms" could sustain the statute. *Id.* The statute was found to be constitutional because the compelling interest in eradicating discrimination against female citizens justified application of the statute to the Jaycees. *Roberts, supra,* 104 S. Ct. at 3253, 468 U.S. at 623.

Uncontroverted documentary evidence in the form of a GLIB fact sheet established that the purpose of GLIB requesting participation in the Parade was to (1) "celebrate our Irish heritage as openly gay, lesbian, and bisexual individuals", (2) "support our sisters and brothers in ILGO in New York City", and (3) " . . . remind people that there are lesbians, gays, and bisexuals within all demographic areas, including people of Irish heritage". (A. 51). The fact sheet also established that GLIB was formed in early January, 1992 and that while it is open to all gay men, lesbians, and bisexuals of Irish descent, its composition also includes "others interested in Irish and Irish-American issues". (A. 57). Further, this record established that by telefax and letter dated January 14, 1993, GLIB was advised that:

> The vote that was recently taken by my client did not permit any group with any sexual themes to march was merely a formalization of the fact that my client has a traditional parade expressing its religious and social values.

(A. 49).

The order of the lower courts required the Council to convey GLIB's message over their objection. Even if the Council conveyed no message, this order is an unconstitutional infringement of the Council's First Amendment rights not to broadcast a message which it disagrees with. *See Pacific Gas and*

Elec. v. P.U.C. of California, 475 U.S. 1, 9-10, 106 S. Ct. 903, 908 (1986) (public utilities commission could not order utility to place newsletter of third party in billing envelope).

As the dissenting justice pointed out, there was no evidence in the record that the Council ever inquired into the sexual preference of any person intending to march in the Parade, including members of GLIB. (C. 25 n.4). If there had been such evidence, there can be no question that (although this Court not reach the point) Massachusetts would be justified in construing its public accommodations anti-discrimination statute to prohibit discrimination based upon sexual orientation of any individual who wished to participate in the Parade. *Cf. New York County Board of Ancient Order of Hibernians v. Dinkins,* 814 F. Supp. 358 (S.D.N.Y. 1993) (members of Irish Lesbian Gay Organization (ILGO) were permitted to march as individuals without a banner as guests of various parade contingents but had no constitutional right to have their message be part of New York's annual St. Patrick's Day parade which is sponsored and run by the Ancient Order of Hibernians).

What was done in Massachusetts, however, crosses the line, that is, to require that the Council broadcast a message which it does not desire to do.

CONCLUSION

The judgment should be vacated.

Respectfully submitted,

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